

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
LOS ANGELES REGION

In the Matter of:)	
)	
City of Malibu)	Order No. R4-2008-0041-R
No. R4-2008-0041-R for)	Settlement Agreement and Stipulation for
Administrative Civil Liability)	Order; Stipulated Order
)	

Section I: Introduction

This Settlement Agreement and Stipulation for Order ("Stipulation") and Stipulated Order (the "Order") are issued in reference to an adjudicative proceeding initiated by the issuance of Administrative Civil Liability Complaint No. R4-2008-0041-R, dated February 16, 2010 (the "Complaint"). The parties to this proceeding are the Los Angeles Regional Water Quality Control Board ("Regional Water Board") Prosecution Team, and the City of Malibu ("City")(collectively the "Parties").

Section II: Recitals

1. The City of Malibu undertook construction of the Solstice Canyon Creek Bridge Replacement Project ("Project") in the vicinity of 26023 Pacific Coast Highway and Corral Canyon Road in Malibu pursuant to Streambed Alternation Agreement No. 1600-2006-0361-R5 from the Department of Fish & Game, which was acting to implement an approved restoration project under its Water Quality Certification Application issued by the State Water Resources Control Board, Order No. 2003-0017-DWQ. The Project consisted of removing the existing box culvert under Corral Canyon Road, replacing it with a 28-foot long by 58-foot wide clear span bridge over Solstice Canyon Creek, and grading about 300 feet of the stream channel. The culvert is located approximately 0.25 miles upstream of the Pacific Ocean.
2. Based on the Regional Water Quality Control Board (Regional Board) staff's inspection of the City's Project on January 25, 2008, staff alleges that erosion control and drainage practices employed during the construction activities at the Site were inadequate and resulted in illegal discharges to waters of the State and waters of the United States for which the Regional Board may impose administrative civil liability under section 13350 and 13385 of the California Water Code (CWC).
3. On August 25, 2008, the Regional Board Chief Deputy Executive Officer (Chief Deputy Executive Officer) issued Complaint No. R4-2008-0041 in the amount of \$52,375 for the above-described violations.

4. After further investigation and discussion with the City, on February 16, 2010, the Regional Board Assistant Executive Officer (Assistant Executive Officer) issued Revised Complaint No. R4-2008-0041-R (Revised Complaint) in the amount of \$30,015 for alleged violations of Order No. 2003-0017-DWQ and the 401 Water Quality Certification. The Revised Complaint superseded Complaint No. R4-2008-0041, which was rescinded.
5. A dispute has arisen between the Parties as to whether the Project was carried out in accordance with the City's permits and the Clean Water Act.
6. The City disputes the allegations, findings and conclusions set forth in ACL Complaint Revised ACL Complaint No. R4-2008-0041-R.
7. The Parties now wish to resolve this dispute to avoid further expense and expenditure of resources in connection with this matter.

NOW, THEREFORE, in consideration of the mutual covenants and agreements described below, and for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, in order to avoid additional costs to Parties associated with the ongoing dispute over the facts and assumptions that form the basis of the Revised ACL Complaint, the Parties stipulate as follows:

8. Contentions

A. RWQCB staff contends as follows:

- 1) Based on an inspection of the site of the Project by Regional Board staff on January 25, 2008, the RWQCB staff determined that erosion control and drainage practices employed during the construction activities were inadequate and resulted in illegal discharges to waters of the State and waters of the United States;
- 2) The City's contractor placed spoils piles and fill in the streambed causing discharge of sediment into Solstice Creek when diversions failed during a rain event;
- 3) Erosion control and drainage practices employed during construction activities in connection with the Project proved inadequate and resulted in discharges inconsistent with the 401 Water Quality Certification, leading to civil liability pursuant to Water Code sections 13385 and 13323.

B. The City contends as follows:

- 1) The City's permit allowed it to divert the stream and work in the streambed. Once the creek is diverted, the streambed is the construction site. The City's permit allowed work in the streambed and the bridge replacement could not be performed otherwise;

- 2) An overwhelming rain event occurred just prior to January 25, 2008. The overwhelming discharge of rainwater in the creek due to a series of previous rain events and fires caused the construction site to suffer major damages. The photos taken the next day show a distressed construction work site. The City's daily construction records include photos and communications before, during, and after the January rain event and document the City's conduct in directing its contractor to implement appropriate Best Management Practices (BMPs) before the rain event and re-installing damaged BMPs after the overwhelming rain event;
- 3) In response to the ACL, the City submitted information and evidence disputing the staff's conclusions and the parties engaged in discussions regarding the allegations in the ACL. In January 2009, the RWQCB staff took under consideration the City's evidence and information.

C. Each Party acknowledges that this Settlement Agreement effects the settlement of claims and contentions that are denied and contested by the other, and that nothing contained herein can be construed as an admission of wrongdoing by or on behalf of either Party. This Order may be used as evidence, consistent with CWC section 13327, of a prior enforcement action that was settled without determination of any wrongdoing by the City.

9. The Regional Water Board accepts the City's information provided as an adequate report of the January 2008 incident in connection with the Solstice Creek Bridge Replacement project and the Prosecution Team hereby agrees not to initiate any other administrative or judicial enforcement actions against the City for the violations alleged in the Complaint.
10. To resolve the dispute between the parties by consent and without further administrative proceedings certain alleged violations of the California Water Code ("CWC"), Order No. 2003-0017-DWQ and the 401 Water Quality Certification set forth in the Complaint, the City agrees to pay \$30,000 to the State Water Resources Control Board "Waste Discharge Permit Fund", which includes \$7,500 for staff costs. Payment of \$30,000 is due no later than 15 days following the execution of this Order by the Regional Water Board.
11. Within 15 days of receipt of payment, the Regional Water Board will rescind the Revised ACL Complaint No. R4-2008-0041-R
12. Each Party shall bear all attorneys' fees and costs arising from the Party's own counsel in connection with the matters set forth herein
13. This Settlement Agreement is limited only to the 2008 Solstice Creek Bridge Replacement project.
14. In settling this matter, the City does not admit to any of the findings of the Complaint, or that it has been or is in violation of the CWC, or any other federal, state, or local law or ordinance.

15. The City understands that this Order must be noticed for a 30-day public review and comment period. In the event objections are raised during the public comment period for the Order, the Regional Water Board or the Executive Officer may, under certain circumstances, require a public hearing regarding the Order. In that event, the Parties agree to meet and confer concerning any such objections, and may agree to revise or adjust the Order as necessary or advisable under the circumstances.
16. The Parties agree that the procedure contemplated for adopting the Order by the Regional Water Board and review of this Stipulation by the public is lawful and adequate. In the event procedural objections are raised prior to the Order becoming effective, the Parties agree to meet and confer concerning any such objections, and may agree to revise or adjust the procedure as necessary or advisable under the circumstances.
17. The Parties have been represented by counsel in the preparation and negotiation of this Settlement Agreement. Accordingly, this Settlement Agreement shall be construed according to its fair language and any ambiguities shall not be resolved against the drafting Party.
18. This Stipulation and Order shall not be modified by any of the Parties by oral representation made before or after its execution. All modifications must be in writing, signed by all Parties, and approved by the Regional Water Board and the City Council.
19. This Stipulation may be executed in counterparts and by facsimile signature.
20. In the event that this Order does not take effect because it is not approved by the Regional Water Board, or its delegee, or is vacated in whole or in part by the State Water Resources Control Board or a court, the Parties acknowledge that they expect to proceed to a contested evidentiary hearing before the Regional Water Board to determine whether to assess administrative civil liabilities for the underlying alleged violations, unless the Parties agree otherwise. The Parties agree that all oral and written statements and agreements made during the course of settlement discussions will not be admissible as evidence in the hearing. The Parties agree to waive any and all objections based on settlement communications in this matter, including, but not limited to:
 - a. Objections related to prejudice or bias of any of the Regional Water Board members or their advisors and any other objections that are premised in whole or in part on the fact that the Regional Water Board members or their advisors were exposed to some of the material facts and the Parties' settlement positions as a consequence of reviewing the Stipulation and/or the Order, and therefore may have formed impressions or conclusions prior to any contested evidentiary hearing on the Complaint in this matter, except to the extent that this has resulted in actual bias; or
 - b. Laches or delay or other equitable defenses based on the time period for administrative or judicial review but only to the extent this period has been extended by these settlement proceedings commenced after the issuance of the

revised ACL on February 16, 2010:

21. The City has been informed of the rights provided by CWC section 13323, subdivision (b), and hereby waives its right to a hearing before the Regional Water Board prior to the adoption of the Order.
22. The City hereby waives its right to petition the Regional Water Board's adoption of the Order for review by the State Water Resources Control Board, and further waives its rights, if any, to appeal the same to a California Superior Court and/or any California appellate level court.
23. The City covenants not to sue or pursue any administrative or civil claim(s) against any State Agency or the State of California, their officers, Board Members, employees, representatives, agents, or attorneys arising out of or relating to any covered matter.
24. The individual(s) executing this Settlement Agreement attest, warrant, and represent that they are duly authorized to execute this Settlement Agreement on behalf of their respective Party.
25. This Stipulation is effective and binding on the Parties upon the execution of this Order.

IT IS SO STIPULATED.

Los Angeles Regional Water Quality Control Board Prosecution Team

By: Samuel Unger
Samuel Unger
Interim Executive Officer

Date: 6-7-10

City of Malibu

By: _____
Jim Thorsen
City Manager

Date: _____

STIPULATED ORDER

26. The Regional Water Board incorporates Paragraphs 1 through 25 by this reference as if set forth fully herein.

revised ACL on February 16, 2010.

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Samuel Unger
Interim Executive Officer

Date: _____

City of Malibu

By: _____
Jim Thorsen
City Manager

Date: 6/3/10

STIPULATED ORDER

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27. The Parties believe that settlement of this matter is in the best interest of the public. Therefore, to settle the Complaint, the City hereby agrees to comply with the terms and conditions of this Order.
28. The Regional Water Board finds that the Recitals set forth in herein in Section I and II are true.
29. In accepting this settlement, the Regional Water Board has considered, where applicable, each of the factors prescribed in CWC section 13385(e). The Regional Water Board's consideration of these factors is based upon information obtained by the Regional Water Board's staff in investigating the allegations in the Complaint or otherwise provided to the Regional Water Board. In addition to these factors, this settlement recovers the costs incurred by the staff of the Regional Water Board for this matter.
30. This is an action to enforce the laws and regulations administered by the Regional Water Board. The Regional Water Board finds that issuance of this Order is exempt from the provisions of the California Environmental Quality Act (Public Resources Code, sections 21000 et seq.), in accordance with section 15321(a)(2), Title 14, of the California Code of Regulations.
31. The Regional Water Board is authorized to refer this matter directly to the Attorney General for enforcement if the City fails to perform any of its obligations under the Order.
32. Fulfillment of the City's obligations under the Settlement Agreement constitutes full and final satisfaction of any and all potential liability for each claim in the Complaint in accordance with the terms of this Order.

Pursuant to CWC section 13323 and Government Code section 11415.60, this settlement agreement **IS HEREBY ACCEPTED AND ORDERED APPROVED** on behalf of the Los Angeles Regional Water Quality Control Board.

Mary Ann Lutz
Chairperson, LARWQCB

Date: _____